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Consumer Credit–The Department Store Revolving Charge Account--Usury Resurrected–*State v. J.C. Penney Company*

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RECENT DEVELOPMENTS

CONSUMER CREDIT—The Department Store Revolving Charge Account—Usury Resurrected—*State v. J.C. Penney Company**

I. INTRODUCTION

The Attorney General of Wisconsin recently brought an action against the J.C. Penney retailing chain for an injunction against any further charges of 1½% per month on the declining balances of its revolving charge accounts. The state alleged that anything in excess of 1% per month was a violation of the $12 per $100 per annum usury ceiling established by its legislature as the maximum chargeable for a loan or forbearance of money.[1] Penney admitted that its monthly charge frequently exceeded the allowable rate but argued that its charge was a "time-price differential," exempt from statutory control under the time-price doctrine.[2] The trial court rejected this contention. In deciding that the monthly charge in fact represented interest on the forbearance of an indebtedness created by the sale, the court refused to apply the doctrine, by which all but two American jurisdictions have traditionally exempted credit sales from the strictures of the usury laws.[3] The trial court nonetheless refused the injunction on the ground "[t]hat the right to assert the violation of section 138.05(1) is a right personal to the persons who contract with defendant under . . . [Penney's charge account agreement]."[4]

The Supreme Court of Wisconsin affirmed the finding of usury but also directed that the injunction be issued on the basis of a finding that the defendant's usurious practices clearly constituted a public

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* 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

1. 48 Wis. 2d at 127, 179 N.W.2d at 642. WIS. STAT. ANN. §§ 138.05(1), .09(9)(a) (Supp. 1971). Section 138.05(1) provides in part that no person shall

> directly or indirectly, contract for, take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value, for the *loan or forbearance* of money, goods or things in action, than:
>
> (a) At the rate $12 upon $100 for one year computed upon the declining principal balance of the loan or forbearance . . . (emphasis added).

2. 48 Wis. 2d at 129, 179 N.W.2d at 643. For a discussion of the operation of the time-price doctrine, see notes 25-29 *infra* and accompanying text.

3. Those jurisdictions are Arkansas and Nebraska. *See* notes 83-85 & 91-94 *infra* and accompanying text.

4. 48 Wis. 2d at 130, 179 N.W.2d at 643. The trial court concluded that a violation of section 138.05(1) "is not a matter in which the state of Wisconsin has any right or interest nor does it create any common or public nuisance requiring defendant to be enjoined at the instance of the state." 48 Wis. 2d at 130, 179 N.W.2d at 643. It should be noted, however, that criminal penalties were available to the Wisconsin Attorney General. *See* WIS. STAT. ANN. § 138.06(2) (Supp. 1971).

nuisance.[5] This decision represents more than a minority view on an obscure legal technicality. The result resurrects usury laws, which had been effectively interred by a history of judicial and legislative exceptions to their application. Moreover, it seems probable that the decision will have economic impacts adverse to the interests of the consumer it purports to protect.

Under a standard revolving credit agreement, of which the Penney charge account agreement is representative, the customer may pay the cash price of purchases charged to his account, without any additional charges, at any time before the second billing date following his purchases.[6] At the second billing date, if the cash price is still unpaid, it is added to the unpaid balance in the account and the total is subjected to a monthly "service charge," usually of 1½%.[7] Payments are made on the unpaid balance according to a schedule of minimum monthly installments, which depend upon the size of the debt outstanding. Generally, there is also a limit on the total outstanding debt allowable under each account.[8] Acceptance of this type of agreement by consumers has been attributed to several factors: (1) the availability to the customer of a ready fund in the amount of the allowable account maximum; (2) the administrative simplicity resulting from the merger of separate debts into a single amount upon which only one monthly payment need be made; and (3) the ease with which a customer may maintain a continuing indebtedness without "repeated sober reappraisals required by the difficult and formal contract negotiations that precede every normal debt."[9] Furthermore, there is evidence that such an agree-

5. 48 Wis. 2d at 155, 179 N.W.2d at 657. Apparently, the state's objective in invoking a consumer-protective device—the usury law—was to protect consumers from the usurious practice at issue.

6. 48 Wis. 2d at 135-37, 179 N.W.2d at 646-47.

7. NATL. RETAIL MERCHANTS ASSN., STUDY OF CONSUMER CREDIT COSTS IN DEPARTMENT STORES 3 (1963) [hereinafter NRMA STUDY]. All but one of eleven merchants studied were charging 1.50% on the monthly charge account balance, and that one converted prior to publication of the results. *See also* Lynch, *Consumer Credit at Ten Per Cent Simple: The Arkansas Case,* 1968 U. ILL. L.F. 592, 596-99. Thus, any accusations that the real rate of interest is always in excess of 18.00% per annum are unfounded since payment before the second billing date would avoid that result. For an example of a particularly inflammatory use of this inapplicable argument, which may have had an influence in creating the pressures that brought about the action in the principal case, see Boyle, *Charges for Revolving Credit and Charge Accounts, Subject for Scrutiny, Wisconsin Supervisor Suggests,* 12 PERS. FIN. L.Q. REP. 33 (1958). In fact, in an arrangement like Penney's, in which no finance charge is assessed during the first thirty days of account activity nor for the month in which the customer pays the account balance in full, the real interest rate will more closely approximate 14.00%. In a study of fifteen stores offering revolving credit agreements (thirteen accounts at 1.50% and two at 1.25%), the effective annual rate was 13.60%. Lynch, *supra* at 597.

8. For a complete discussion of the account involved in *Penney,* see 48 Wis. 2d at 128-29, 179 N.W.2d at 642-43.

9. *Symposium: Developments in the Law, Part III, Revolving Credit,* 55 NW. U. L. REV. 330, 331-32 (1960) [hereinafter *Revolving Credit*].

ment is "usually the cheapest form of consumer credit available to the small borrower,"[10] and in some instances probably the only form available.[11]

The popularity and wide acceptance of revolving credit agreements might argue for a result opposite from that reached in *Penney*.[12] Nearly every large department store in the United States offers revolving credit;[13] of these, Penney was the last major retailer to succumb to the competitive pressures created by others offering it.[14] The first such arrangement was introduced by Wanamaker's in 1938 almost certainly as a simple promotional scheme,[15] but it became very popular with consumers as a convenience and, its critics argue, with retailers, who found it to be a profitable operation in itself.[16] If for no other reason than that revolving credit agreements have achieved widespread consumer acceptance throughout the United States, the logic and rationale of the Wisconsin court's decision to invalidate Penney's credit agreement deserves scrutiny.

II. Legislative and Judicial Avoidance of Usury Laws

Usury laws, derived almost exclusively from ecclesiastical sources,[17] have come to be viewed as

> blunt instruments of social control. Unrefined and clumsy, they are also ineffective. They not only fail to accomplish their purpose, but produce harmful side effects as well. Without escape valves, the effect of these laws would have been devastating. Even with escape valves, they do more harm than good.[18]

10. *Revolving Credit, supra* note 9, at 334.

11. If loans were available for the same purposes as revolving credit agreements are, the problem of high interest rates connected with the latter would likely disappear. The purchaser would simply pay off his charge account balance in time to avoid the service charge with money borrowed from lenders at nonusurious rates.

12. Indeed, the Wisconsin supreme court took judicial notice of the "widespread use of the revolving charge account and of the large number of Wisconsin citizens affected by these practices," but did so only to conclude that such practices were pervasive enough to support a finding of a public nuisance. 48 Wis. 2d at 155, 179 N.W.2d at 657.

13. *Revolving Credit, supra* note 9, at 332 n.14.

14. S. Margolius, The Innocent Consumer vs. the Exploiters 54 (1967) (Penney's was "traditionally a cash store").

15. *Revolving Credit, supra* note 9, at 330-33.

16. *See* notes 69 & 70 *infra* and accompanying text.

17. *See generally* Frierson, *Changing Concepts on Usury: Ancient Times Through the Time of John Calvin*, 7 Am. Bus. L.J. 115 (1969). Authors have traditionally cited the passages from *Ezekiel* 18:13: "He has lent on usury; he has taken interest; he shall surely not live . . . . He shall surely suffer death; his blood is upon him"; and *Deuteronomy* 23:19-20: "Thou shalt not lend upon usury to thy brother . . . ." Until the time of Calvin, whose reinterpretation of traditional Christian dogma against lending money for interest had a tremendous impact on the rapidly expanding economies of Western Europe during the seventeenth century, *any* taking of interest, no matter how small, constituted usury. *Id.* at 123-24.

18. Shanks, *Practical Problems in the Application of Archaic Usury Statutes*, 53

Several reasons generally are proffered for the inadequacy of usury laws. First, in a truly competitive market, in which supply and demand force loan interest rates above the arbitrary ceiling of the statute, the prospective lender need only use another mode of investment to realize the higher rate of return; second, since interest rates on *consumer* loans are those that most often conflict with the maximum rates set out in usury statutes, the persons most likely to be denied the power to purchase are those the law purports to protect; and third, only the legitimate lender is deterred from charging interest above the statutory ceiling, whereas the unscrupulous lender is encouraged to charge even more than he would normally be inclined to ask, since he must hedge against the added risk factor of being found in violation of the statute.[19]

The persuasiveness of the above arguments has occasioned the repeal of all usury laws in France, England, and Massachusetts.[20] Where such laws are still in effect,[21] however, the harsh consequences of statutory interest ceilings are being ameliorated by periodic amendments and legislative exceptions each time new commercial exigencies manifest themselves.[22] The result, in most states, is a pastiche of legislation, which by its own complications betrays the ad hoc character of its development.[23] In addition to providing higher maximum rates, the legislatures have facilitated creditors' efforts to circumvent the usury laws by authorizing special charges and discount methods to increase the effective rate of interest, by

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VA. L. REV. 327, 329 (1967). The author maintains that this is the "generally accepted [view of] all serious students on the subject." *Id.* at 330.

19. *Id.* at 330.

20. *Id.* at 330. Shanks attributes the demise of the usury laws in these jurisdictions to A. Turgot's *Memoire sur les Prêts d'Argent* (1769); Jeremy Bentham's *Letters in Defense of Usury* (1787); and to Richard Henry Dana's Address in the House of Representatives of Massachusetts, Feb. 14, 1867. *Id.* at 330-31. He acknowledges that similar efforts failed in Virginia, and in Congress when the repeal of the District of Columbia usury statute was sought. *Id.* at 331. *See also Are Charges for Revolving Credit Subject to the Usury Laws?*, CONF. ON PERS. FIN. LAW, PROGRAMS AND PAPERS iv (1958) [hereinafter PROGRAMS AND PAPERS].

21. In the United States, all but three states—Maine, Massachusetts, and New Hampshire—presently have usury laws. B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 140-43 (1965). *See also* 1 CCH CONSUMER CREDIT GUIDE ¶ 510, at 1301-07 (1971).

22. *See generally* Benfield, *Interest Ceilings and the Uniform Consumer Credit Code*, 56 A.B.A.J. 946 (1970).

23. Illinois, for instance, has an installment loan act (ILL. REV. STAT. ANN. ch. 74, §§ 51-77 (Smith-Hurd 1966)); an installment loan rate (ILL. REV. STAT. ANN. ch. 74, § 4a (Smith-Hurd 1966)); a consumer finance act (ILL. REV. STAT. ANN. ch. 74, §§ 19-46 (Smith-Hurd 1966)); a revolving loan and credit law (ILL. REV. STAT. ANN. ch. 74, §§ 4.1-.3 (Smith-Hurd Supp. 1971)); an insurance premium financing law (ILL. REV. STAT. ANN. ch. 73, §§ 1065.60-.68 (Smith-Hurd Supp. 1971)); a motor vehicle installment sales act (ILL. REV. STAT. ANN. ch. 121½, §§ 561-86 (Smith-Hurd Supp. 1971)); and an "other goods" installment sales act (ILL. REV. STAT. ANN. ch. 121½, §§ 501-33 (Smith-Hurd Supp. 1971)). Each of these acts has a different maximum rate.

reducing penalties for violations, and by eliminating the defense of usury for corporate borrowers.[24]

One area in which legislatures have generally not been forced to enact a loophole is that of "time-price" or "credit" sales, where a judicially created rule, the time-price doctrine, has traditionally been called upon to justify the exemption of such sales from the requirements of usury laws. The time-price doctrine seems to have had its origin in the 1827 case of *Beete v. Bidgood*.[25] The Court of the King's Bench, distinguishing between interest charges on loans and higher prices for deferred-payment sales of property,[26] held that a seller may offer an article at two different prices, a cash price and a credit or time-price. The rule came to be recognized that it is immaterial if a time-price exceeds the cash price by more than the statutory allowance for interest on a loan in the amount of the cash price for the same duration.[27] The foremost American statement of the rule, from the United States Supreme Court, illustrates its primary "logic":

> A vendor may prefer $100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; [and one who will not distinguish between things that differ must say, with apparent truth, that B (purchaser) pays a hundred per cent for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises, the conclusion is manifestly erroneous.] Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.[28]

A previous Wisconsin decision had also adopted this reasoning.[29]

Another explanation for the exemption of credit sales from the strictures of the usury laws is primarily historical. When usury stat-

24. Shanks, *supra* note 18, at 332-33.

25. 7 B. & C. 453, 108 Eng. Rep. 792 (K.B. 1827).

26. The court noted that confusion sometimes arose because when a prospective seller quoted two prices, one for immediate sale and one for deferred sale, the difference was called "interest." 7 B. & C. at 458, 108 Eng. Rep. at 794. *See also* B. CURRAN, *supra* note 21, at 13-14. (The Curran book is divided into two sections, one for legislation regulating lenders and one for legislation regulating vendors.)

27. *See* Annot., 14 A.L.R.3d 1065 (1967).

28. Hogg v. Ruffner, 66 U.S. (1 Black) 115, 119 (1861) (brackets added). This passage, except for the bracketed portion, was quoted by the Wisconsin supreme court in *Penney*. 48 Wis. 2d at 141, 179 N.W.2d at 649.

29. The penalties and prohibitions of the [usury] statute are aimed at the receiving or contracting to receive a greater rate of interest than that prescribed by it upon the *loan* or *forbearance* of money, or other things, and do not apply to the *sale* of a note or any other vendible commodity, which, when in good faith intended as such, may be sold and transferred for such price as may be fixed by agreement of the parties. The only limitation upon this principle, if it may be properly so called, is that made necessary for the purpose of giving effect to the spirit and intent of the law against usury by preventing the parties from resorting to the form as a cloak to cover for what is in reality a usurious loan.

Otto v. Durege, 14 Wis. 621 623-24 (1861).

utes were first enacted, installment or credit buying was virtually unknown; it was a device normally associated with the purchase of luxuries, so that those partaking of its benefits were not at all the persons whom the usury laws were designed to protect.[30] This reasoning, somewhat modernized, is still compelling for many in the twentieth century who support the exemption of credit sales: "[A] purchaser is not like a needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller."[31] Some have attributed the preferential treatment for the seller to the fact that his time-price differential may include compensation for the increased risk of a credit sale.[32] Another possible explanation is the presumption indulged that natural competition among sellers in the market place will protect buyers from exorbitant credit charges.[33] Finally, the exemption has been attributed to the fact that usury laws run contrary to the general policy of freedom of contract and therefore were not to be extended absent a clear-cut legislative mandate.[34]

III. The Penney Decision

The Wisconsin supreme court subjected Penney's revolving credit arrangement to a factor analysis[35] with a view toward determining

30. Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 YALE L.J. 839, 842-43 (1959).

31. Gen. Motors Accept. Corp. v. Weinrich, 218 Mo. App. 68, 78, 262 S.W. 425, 433 (1924). Typical of the shroud beclouding usury decisions is the fact that commentators have called the rationale espoused in *Weinrich* obsolete for exactly opposite reasons. In *Revolving Credit, supra* note 9, at 336-37 n.32, this argument is called unrealistic today because the great preponderance of all credit, whether extended to a borrower or a purchaser, is used for *luxuries*, so that neither is in need of credit. Another author calls the *Weinrich* view "manifestly anachronistic" today because one can purchase on credit with the same amount of need as the borrower: "If the usury laws were designed to protect weak and needy persons from the overreaching of economically superior renters of capital, then it should be recognized that the bargaining position of instalment buyers may be as disadvantageous as that of borrowers of money." Warren, *supra* note 30, at 843. *See also* NRMA STUDY, *supra* note 7, at 3; Comment, *Retail Credit Sales and Usury*, 24 LA. L. REV. 822, 839 (1964) ("The equality of bargaining power between vendor and vendee assumed by the common law is hardly realistic in motor vehicle sales as automobiles are frequently considered necessities . . . .").

32. Comment, *supra* note 31, at 824-25. This would seem to be a doubtful assertion, since it is a poor assumption that any lender would overlook the same factors considered by sellers as a cost component in evaluating his income possibilities; in fact, it would seem that a lender risks the total amount loaned (unless the loan was discounted), whereas the true risk to a vendor who makes a 50% markup on goods sold is only half as much, *i.e.*, his costs. Perhaps the more critical factor behind this preferential treatment is that of a "general hostility to usury statutes by bench, bar and business." *Id.* at 826.

33. *Revolving Credit, supra* note 9, at 336.

34. Note, *Judicial and Legislative Treatment of "Usurious" Credit Sales*, 71 HARV. L. REV. 1143, 1145 (1958).

35. *See* 48 Wis. 2d at 144, 179 N.W.2d at 651, in which the supreme court repeated the trial court's "detailed analysis of factors."

whether in substance, as well as in form, a time-price sale, and not a loan or forbearance in the sense of the usury law, was involved.[36] The court concluded that the revolving credit plan involved a "forbearance" within the meaning of the statute[37] such as would justify a finding of an "implied loan" in the circumstances. The court had thereby determined that the plan contained the elements necessary for finding a transaction usurious.[38] The opinion side-stepped the traditional view that a sale of property, involving no prior debt, cannot involve a loan or forbearance of money[39] and merely held that "[c]learly the trial court is correct when it concludes that the purchase of goods creates an obligation to pay for them."[40] The *Penney* court's rationale was that to allow deferred payment on this obligation is enough to constitute a forbearance in substance, since all that would be necessary for a forbearance in form would be the addition of the words "[t]his debt becomes due and payable in thirty days from the date of purchase" to the credit agreement.[41] Such an insignificant formality, the court held, should not be controlling.[42]

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36. 48 Wis. 2d at 141-42, 179 N.W.2d at 649-50 (citing Otto v. Durege, 14 Wis. 621, 623-24 (1861)).

37. *See* note 1 *supra*.

38. The elements of a usurious transaction in Wisconsin are typical. In Zang v. Schumann, 262 Wis. 570, 55 N.W.2d 864 (1952), the court listed them:

> The definition of usury imports the existence of certain essential elements generally enumerated as (1) a loan or forbearance, either express or implied, of money, or of something circulating as such; (2) an understanding between the parties that the principal shall be repayable absolutely; (3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law.

262 Wis. at 579, 55 N.W.2d at 868, quoting 55 AM. JUR. *Usury* § 12, at 331 (1946). Since the second and third elements were found in *Penney*, 48 Wis. 2d at 133, 179 N.W.2d at 645, and since the court upheld the trial court's finding of an implication of the fourth element because the contract on its face imported usury, 48 Wis. 2d at 150, 179 N.W.2d at 654-55, only the first element was at issue.

39. This fact has been recognized in the opinions of the Wisconsin Attorney General, who observed that "most courts hold that a debt must be due before there is a forbearance." 54 OP. WIS. ATTY. GEN. 235, 245 (1965). The opinion, requested by the Commissioner of Banks, involved the question of whether revolving charge account plans "constitute loans or forbearance subject to the provisions of the usury statutes, or whether all or any one of them qualify as time sales under the 'time price doctrine.'" *Id.* at 235. The opinion noted the view in Arkansas where the word "forbearance" has been held to mean simply "that the person to whom the money is owed waits for all or part of the money after the consummation of the contract in which money is involved, or that the seller foregoes payment in cash and waits for all or part of his money." *Id.* at 245. *Cf.* Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957).

40. 48 Wis. 2d at 135, 179 N.W.2d at 646.

41. 48 Wis. 2d at 136, 179 N.W.2d at 646-47.

42. 48 Wis. 2d at 136, 179 N.W.2d at 647. Two other jurisdictions, Arkansas and Nebraska, have used the same logic to conclude that while not properly a "loan," a credit transaction necessarily involves a "forbearance," under contract, from collecting a debt when due. Lloyd v. Gutgsell, 175 Neb. 775, 782, 124 N.W.2d 198, 203 (1963); Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 467, 308 S.W.2d 802, 804 (1957). For a

The second thrust of the Wisconsin supreme court's analysis went to the requirement commonly used to defeat the protection of the time-price doctrine in installment sales situations, that of requiring a "bona fide" time-price. In some jurisdictions credit sales, no longer ipso facto exempt, are presumed to be subject to the usury laws unless it can be demonstrated that two prices, a cash price and a time-price, were quoted to the prospective buyer. There must be a clear and obvious pre-sale disclosure of the total obligation.[43] Since under a revolving charge account the ultimate time-price to be paid by the purchaser is incalculable,[44] this factor, strictly applied, would suffice to expose such plans to the usury laws. Another factor cited by the *Penney* court as preventing a finding of bona fide time-price sale was the similarity of a revolving charge account to a so-called "open account."[45] The periodic percentage charges added to the outstanding balances of open accounts have been held subject to the usury laws because such "running" accounts can involve multiple purchases.[46] More importantly, however, the court pointed out that the revolving charge is uniquely vulnerable to the two-price test because, unlike an installment sale contract, the revolving charge agreement can be made before any specific sale is even contemplated;[47] *both* the cash

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general discussion of the Nebraska and Arkansas treatments of time-price or credit sales, see B. CURRAN, *supra* note 21, at 83-90.

43. *Revolving Credit, supra* note 9, at 338. The *Penney* court cited Lee v. Peckham, 17 Wis. 394, 398 (1863), for the proposition that courts will look through the form to the substance of an agreement alleged to be usurious. 48 Wis. 2d at 137, 179 N.W.2d at 647. This trend of looking through the "form" to the "substance" in a bona fide sale is discussed in Annot., 14 A.L.R.3d 1065, 1070 (1967). The earliest use of this approach was probably made in Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739 (1944). *See also* McNish v. Grand Island Fin. Co., 164 Neb. 543, 83 N.W.2d 13 (1957); Hillmann's v. Em 'N Al's, 345 Mich. 644, 77 N.W.2d 96 (1956); G.F.C. Corp. v. Williams, 231 S.W.2d 565 (Tex. Civ. App. 1950). For the *Hogg* formula for a bona fide time-price sale, see note 28 *supra* and accompanying text.

Neither the forbearance approach nor the bona fide time-price (and concomitant two-price requirement) approach to holding time-price arguments invalid is to be confused with the holdings in cases in which arrangements are found to be merely disguised loans or "schemes or devices" to avoid the usury laws. These decisions are common to virtually all jurisdictions having a usury statute. *See generally* E. FARNSWORTH & J. HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 1111-27 (2d ed. 1968).

44. Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285, 1306 (1966). *See also* PROGRAMS AND PAPERS, *supra* note 20, at 47-66. But it has been pointed out that although most installment sales contracts contain provisions for options to prepay, for default and delinquency charges, and for the possibility of refinancing, such contracts have not fallen prey to the two-price requirement. *Revolving Credit, supra* note 9, at 338-39 n.40.

45. 48 Wis. 2d at 146, 179 N.W.2d at 652.

46. *E.g.*, James Talbott, Inc. v. Jackson, 137 N.Y.S.2d 416 (Sup. Ct. 1954).

47. 48 Wis. 2d at 148, 179 N.W.2d at 653. *See* McNish v. Grand Island Fin. Co., 164 Neb. 543, 548, 83 N.W.2d 13, 17 (1957). The court in *NcNish* was also concerned that the contract did not differ from one customer to another. 164 Neb. at 547, 83 N.W.2d at 16.

price and the time-price are incapable of computation at this juncture.

The bona fide time-price requirement, then, is a way to subject consumer credit transactions to the usury laws without expressly discarding the time-price doctrine. Even in the simplest installment sale situation, in which all components of the full time-price have been made known to the consumer prior to the sale so that he could calculate the total dollars-and-cents obligation if he so desired, the contract has been held to lack a bona fide time-price.[48] Although it is at least arguable that a diligent consumer with sufficient mathematical ability could calculate the time-price of any purchase he was about to make,[49] it would probably be futile to make even this argument. In any jurisdiction adopting this restrictive definition of the bona fide time-price, charges for revolving credit in excess of statutory limits will fail as usurious.[50]

Finally, the Wisconsin supreme court rejected any attempt to justify the 1½% per month as merely a service charge. It quoted the trial court's statement that the so-called " 'service charge' is not a fixed amount, independent of the amount owed . . . . [r]ather it is a percentage of a balance of indebtedness and is computed monthly";[51] and further, that there is "no evidence that the cost of the service necessary, or expense incident to the operation of the account, such as bookkeeping, billing, etc. bears any relation to the 'service charge.' "[52]

48. Nelson v. Gen. Credit Co., 166 Neb. 770, 90 N.W.2d 799 (1959); Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957); Natl. Bond & Inv. Co. v. Atkinson, 254 S.W.2d 885 (Tex. Civ. App. 1952). This requirement is considered "meaningful" because a "substantial number" of credit buyers prior to making a purchase do the calculation necessary to determine the total price they must pay. Note, *supra* note 34, at 1145.

49. PROGRAMS AND PAPERS, *supra* note 20, at 40; *Revolving Credit, supra* note 9, at 338 & n.39.

50. *Revolving Credit, supra* note 9, at 338. The author points out that any revolving charge account plan which *could* comply with the strict two-price requirement and provide a strict "dollars-and-cents time-price" would necessarily lack the convenience that has made revolving credit popular and economically feasible. *Id.* at 338. In fact, compliance would seem to be an impossibility if any characteristics of revolving credit are to be retained.

51. 48 Wis. 2d at 147, 179 N.W.2d at 652. The supreme court quoted from Lloyd v. Gutgsell, 175 Neb. 775, 782, 124 N.W.2d 198, 203-04 (1963), on which the trial court had relied:

> There seems to be an impression that if a cash price is quoted and the buyer is unable to pay cash, it is then possible to apply a certain schedule of rates or charges to the cash price in order to determine the time sale price . . . . Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest. This is merely a sale for a cash price, with the difference between the money the buyer has and what he needs being financed.

48 Wis. 2d at 147, 179 N.W.2d at 653.

52. 48 Wis. 2d at 147-48, 179 N.W.2d at 653. *See also* Friedman v. Wisconsin Accept. Corp., 192 Wis. 58, 210 N.W. 831 (1927). This service charge argument is rarely

There is one curious omission from the court's attack on the applicability of the time-price exemption to the present case. It is an argument quite often subsumed under the bona fide heading in attempts to expose so-called time-price differentials as mere usurious loan interest. The argument suggests that if there is a close relationship between the vendor-dealer and a finance agency, the rationale for preference to credit sellers disappears, and the sale should not be considered one at a bona fide time-price.[53] The transaction is treated, in effect, as a disguised loan, on which the "risk and delay of deferred payment is borne by an adequately compensated finance company, rather than by the seller himself."[54] Since it is reported by at least one source that Penney owns its own finance company,[55] one wonders why, in the deluge of factors considered by the *Penney* court, this point was left unmentioned. Perhaps the courts are faced with yet another anomaly in the usury area; that a close relationship with a finance company can invalidate a time-price sale, but the total assimilation of a finance company cannot.

The *Penney* opinion need say little more than it does to expose sufficiently the illogic commonly expounded in support of the time-price doctrine. The court succeeds in its objective of looking through the form of the challenged plan, but it stops before getting to the real substance of the issue presented. The court assumes that the time-price doctrine *could* be applied in some situations and purports merely to expose this *particular* agreement as a sham. In point of fact, however, the court's own unassailable logic leads to the inescapable conclusion that the *entire* time-price doctrine is a fiction.[56]

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pressed in defense of a revolving credit agreement simply because it is so easily defeated. *See, e.g.*, Comment, *Usury and Revolving Credit: The Old Law and the New Economics*, 15 S. DAK. L. REV. 304, 309-12 (1970); *Revolving Credit, supra* note 9, at 335-36. The argument is commonly invoked only by banks on revolving check credit, where because of the absence of any sale aspect, the exemption of the time-price doctrine is unavailable. *Revolving Credit, supra* note 9, at 339.

53. *Revolving Credit, supra* note 9, at 339:

> Many department store revolving credit charge account plans are run entirely by banks, which contract to establish the account, keep all records, and furnish all forms, charge plates, and statements of account. Consequently, sales on such plans would not qualify for the exemptions as *bona-fide* time-sales under this view.

See also Note, *supra* note 34, at 1146-47.

54. Warren, *supra* note 30, at 843-44.

55. S. MARGOLIUS, *supra* note 14, at 54.

56. An analogous line of decisions in Arkansas is illuminating. In a process beginning with Hare v. Gen. Contract Purchase, 220 Ark. 601, 249 S.W.2d 973 (1952), the Arkansas court progressed from the same position *Penney* adopts to the point of admitting that under its decisions "credit sales . . . as distinguished from cash sales have just about disappeared." Sloan v. Sears, Roebuck & Co., 229 Ark. 464, 470, 308 S.W.2d 802, 806 (1957). It is interesting to note that in Arkansas the usury ceiling is a constitutional matter, and the legislature is therefore incapable of rounding its troublesome corners. *See* notes 84 & 85 *infra* and accompanying text.

There is no analytic, economic difference between a loan and a credit sale:

> [C]redit or loan is involved in every exchange in which there is *delay* in completing the transaction. In any case in which the buyer does not render payment to the seller upon acquisition of the seller's goods or services, the economic reality of the situation requires us to acknowledge that the seller is making a loan to the buyer of the value of those goods for as long a period as it takes the buyer to complete his payments.
>
> . . . .
>
> . . . On this principle, we must recognize the unreality of the legal distinction between cash and vendor credit.[57]

As the *Penney* court defines forbearance, not even the classic original sale hypothesized in *Hogg v. Ruffner*[58] could be a valid time-price sale.

It is similarly unrealistic to make the applicability of the usury laws depend upon whether there has been strict compliance with a two-price requirement derived from statements of an 1861 case on a time-price sale. Although there are good reasons and high motives for wanting the buyer to know the true additional dollar costs of the privilege of deferred payment before he makes a purchase, it seems indefensible that in some jurisdictions no method other than a dollars-and-cents total time-price will suffice to achieve these objectives. Does the fact that the consumer cannot or will not calculate the total time-price in advance mean that he must be considered incapable of comprehending any other explanation of the import of his agreement? Is it not possible to explain that agreeing to a 1½% monthly service charge is *exactly the same* as agreeing to pay $101.50 for a $100 item in thirty days, or $118.00 for it in one year?[59] Additionally, it has been argued that disclosure, though helpful, bears no relation to the purposes for which usury statutes were enacted, and that it should by no means be adopted as a test for the validity of a time-price sale.[60] Moreover, to restrict the prospective buyer to a

57. McEwen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. IND. & COM. L. REV. 387, 390-91 (1967).

58. 66 U.S. (1 Black) 115 (1861). *See* note 28 *supra* and accompanying text. An example of the court's confusion is that it restates "the question" as being "whether there is involved here a true credit sale or a charge for a forbearance." 48 Wis. 2d at 137, 179 N.W.2d at 647. It is difficult to imagine that the court thinks the two are mutually exclusive. The way forbearance is defined by the court, every "true" credit sale must involve a charge for forbearance, unless the seller asks no premium for allowing delayed payment. It suffices here to note the words of Shanks, *supra* note 18, at 343: "As might be expected, few usury opinions are edifying. One might go further: they are not really analytical."

59. For a discussion of alternative disclosure requirements in existing and proposed credit legislation, see notes 102 & 103 *infra* and accompanying text.

60. Note, *supra* note 34, at 1145-46. Furthermore, in the installment credit situa-

simple two-price option would remove the flexibility he enjoys under a revolving charge agreement. He could no longer hope to avoid additional charges by early payment.[61]

Worst of all, the primary reasoning behind the two-price requirement is specious. It assumes that a seller will calculate his time-price in some manner other than by adding finance and insurance charges to the cash price, since any such calculation shown on a contract would subject the agreement to the usury laws for a lack of bona fides.[62] In point of fact, however, courts should be suspicious of any *other* time-price calculations, since the method disallowed is the only one the sensible businessman would adopt.[63]

The analytical approach taken by the *Penney* court in defeating the exemption from the usury law provided under the time-price doctrine by finding no bona fide time-price is new only in that it is the first time a court has applied it to revolving charge agreements. When such an analysis was applied by some courts to installment sales in the late 1950's, it elicited this criticism, which seems to be appropriate still:

> In short, these courts look through form not to substance but merely to another kind of form. Though proclaiming the time-price doctrine, they have made compliance with its strictures infeasible in the light of modern instalment-credit practices. If the time-price rule should be abolished, direct abrogation is preferable to hamstringing the operation of the rule by the creation of arbitrary and anachronistic judicial exceptions.[64]

Regardless of whether the court's reasoning was correct, its holding will have the effect of a renunciation in Wisconsin of the time-price doctrine, with the result that charges in excess of 1% per month on revolving charge accounts will be held usurious. Admittedly the court was faced with judicial alternatives that represented little more than a Hobson's choice: either forgo regulation of this major consumer credit practice or subject it to usury laws with adverse economic and commercial effects, including the possible discouragement of legitimate practitioners.[65] Although the problems presented

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tion, there are two other problems with the two-price test: first, it reduces the entire problem to the fact question of whether the total price was ever discussed, with resulting inducement to perjury; second, it makes determinative the issue whether the parties intended to be bound to a price arrived at by adding charges to the cash price, or to a single price total—a strange rule for a law intended to protect the purchaser from his own folly. *Id.* at 1146.

61. *See* text accompanying note 6 *supra.*

62. *See* note 51 *supra* and accompanying text.

63. Warren, *supra* note 30, at 845.

64. *Id.* at 849.

65. *Symposium: Developments in the Law—Part I, Limiting Consumer Credit*

by such credit practices are certainly more amenable to administrative and legislative evaluation and resolution,[66] a court faced with the necessity for decision cannot ignore its duty to balance the consumers' interests against the need to maintain conditions in the consumer credit area that will "encourage financial institutions to meet the credit needs of an ever-growing economy."[67] As one commentator has pointed out, no matter what the original decision should have been with respect to the applicability of usury laws to credit sales, the increase in volume and importance of credit since that time has greatly changed the factors to be considered.[68] It is necessary to strike a balance in evaluating the effects of the *Penney* decision.

Assuming for the moment that loan sharks and gougers are unable to operate outside the legitimate market, the only arguable value of usury laws is control of the excessive credit charge and the unconscionable bargain. Thus, in defense of the *Penney* result any evidence that retail chains can reap large profits from credit operations would be persuasive. Such evidence is not totally absent. It has been argued that the mere fact that revolving credit has been so "assiduously promoted" by America's large "combined store-finance companies" means it must be a lucrative business practice in and of itself.[69] It is reported that one American family in three has a Sears credit account, and that Sears does 58%, or 4 billion dollars worth, of its sales on credit.[70] When it is noted, however, that 40% of the 4 billion dollars sold went for "soft goods" like clothing, "which families used to buy for cash but now often buy on fee-charging revolving credit accounts,"[71] a different explanation for the rapid growth of revolving credit offers itself. Prior to the advent of the

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Charges by Reinterpretation of General Usury Laws and by Separate Regulation, 55 NW. U. L. REV. 303, 315-16 (1960).

66. Warren, *supra* note 30, at 851.

67. *Id.* at 850.

68. Note, *supra* note 34, at 1148. Since this statement was made, the amount of total credit outstanding has more than doubled, from $56 billion in 1960 to over $120 billion in 1969. 56 Fed. Res. Bull. A54, March 1970.

69. S. MARGOLIUS, *supra* note 14, at 54. Others are willing to infer high profitability from the opposition of the National Retail Merchants Association (NRMA) to the federal truth-in-lending legislation as it was to apply to revolving charge accounts. 31 CONSUMER REP. 470, 472 (1967). But since the original legislative proposal was for a disclosure that the annual rate of interest was 18%, perhaps NRMA opposition can be traced to other grounds. As previously noted, the effective annual interest rate is computed to be considerably less than 18% in the typical revolving charge arrangement. *See* note 7 *supra*.

70. S. MARGOLIUS, *supra* note 14, at 54. One indication of this aspect of the phenomenal growth of revolving credit is that Sears now does approximately as much of its credit-sales volume on revolving charges as on installment contracts used for large purchases such as household appliances. *Id.* at 55.

71. *Id.* at 54-55.

revolving charge account practice, the consumer was frequently unable to get credit *or* loans for small items because of the excessive charges necessarily involved.[72] Perhaps, then, the growth of revolving credit can actually be attributed to the fact that it filled a vacuum in consumer credit relations and became a prerequisite to successful competition in retail marketing.[73]

On the question of whether 1½% per month is in fact an excessive charge for the service and thus a justifiable target for the controls of usury laws, few reliable data are available. It is common, however, to find commentators who are persuaded that the great retailers, with their "captive" finance companies, are "selling debt," with the merchandise as a mere come-on to the real moneymaker.[74] These arguments should probably differentiate installment credit from revolving credit since the areas of substantial profit seem to be installment-sale dominated;[75] further, there is evidence that ratios of revenues to costs from credit operations for revolving charge accounts are lower than for installment sales.[76] Additionally, the results of two National Retail Merchants Association (NRMA)-sponsored studies render any contentions of exorbitant profits derived from revolving credit agreements at least questionable. A 1963 study covering eleven department store chains and eighty stores found that for the average active revolving charge account total credit costs *exceeded* revenues from service charges ($13.64 as opposed to $11.82, respectively),[77] a deficiency amounting to about 1.31% of the value of total credit sales.[78] A 1969 study indicated that under present de-

72. Small loans necessitate higher interest rates to maintain a profit margin. It is a common practice then to allow higher interest rates on such loans if the lender obtains a special license. 1 CCH CONSUMER CREDIT GUIDE ¶ 540, at 1601-35 (1971).

73. Vendor-customer relations in the use of the open account have presented several problems over the years: inability of many cash customers of a store to qualify for its regular account service; . . . high credit costs resulting from low volume of purchases, multiple payments and collection efforts; and the general difficulties of administering credit limits in retail stores. Search for the solution to these problems led to the development of revolving and optional accounts. . . . [T]he "revolving" account was conceived as a combination of the open and the installment accounts.

R. BARTELS, CREDIT MANAGEMENT 156 (1967).

74. Comment, *supra* note 52, at 309-12. *See also* H. BLACK, BUY NOW, PAY LATER 111-16 (1961); S. MARGOLIUS, *supra* note 14, at 64.

75. NRMA STUDY, *supra* note 7, at 7.

76. *Id.*

77. *Id.* Costs in this context include new account costs, account servicing costs, account collection costs, interest at 6% on accounts receivable investment (cost of capital), credit space and equipment costs, additional sales persons cost resulting from giving credit, and management costs. *Id.* at 4-5. One third of all costs constituted cost of capital figured at 6% of accounts receivable investment (which, the authors maintain, is conservative, 15% being more likely), one fourth constituted collection costs, and one fourth constituted servicing costs. *Id.* at 14, 17. It should also be noted that the same study finds a virtual break-even balance in the conventional installment account, with average revenues of $17.27 and average costs of $17.25. *Id.* at 7.

78. *Id.* at 19 (Ex. IV).

partment store credit practices, costs of extending credit average 22% of outstanding balances, and therefore that an annual interest rate at that level would be required to reach the break-even point on credit dealings.[79] Consequently, evidence of high profitability and the excessive nature of 1½% service charges seems insufficient to provide confident support for the *Penney* court's decision to expose revolving charge accounts to the control of the Wisconsin usury laws.

To be sure, if the time-price doctrine were applied to exempt the monthly finance charges of revolving charge accounts from usury laws, there would be nothing except competitive forces to prevent retailers from increasing such charges,[80] and the present state of "competition" has failed to satisfy some observers that the consumer's interests are being protected even now.[81] Inasmuch as finance charges for such accounts have become frozen at 1½% nationwide,[82] however, this argument should carry little weight in opposing the application of the time-price doctrine to protect these charges. The conclusion must be that if there are excessive profits in revolving charge accounts at that rate, they have not been demonstrated to exist, nor were they ever invoked by the *Penney* court in its analysis.

To be balanced against the possible argument of high profitability of revolving charge accounts for retail chains are the probable effects that the artificially low interest ceiling of usury laws will have on the economic climate in Wisconsin for both consumers and businesses. Inasmuch as one state, Arkansas, has experienced such effects, scholars are not to be relegated to speculation concerning their nature. In *Sloan v. Sears, Roebuck & Company*,[83] the Arkansas supreme court held that charges on credit sales in excess of the cash price are interest within the meaning of the state's usury law. It is possible that this strict approach is traceable to a unique provision in the state constitution: "[A]ll contracts for a greater rate of interest than ten per cent per annum shall be void, as to principal and interest and the General Assembly shall prohibit the same by law."[84]

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79. NATL. RETAIL MERCHANTS ASSN., ECONOMIC CHARACTERISTICS OF DEPARTMENT STORE CREDIT 42 (1969). *See also* Lynch, *supra* note 7, at 596-99.

80. *See* Boyle, *supra* note 7, at 67.

81. *See Revolving Credit, supra* note 9, at 337, which makes the argument against totally "unhampered competition" and in favor of requiring disclosure of rates, because "eagerness for ready credit has rendered the modern buyer less cautious about the terms."

82. *See* note 7 *supra*.

83. 228 Ark. 464, 308 S.W.2d 802 (1957).

84. ARK. CONST. art. XIX, § 13. The compliance of the legislature with this mandate can be found at ARK. STAT. ANN. § 68-603 (1957). Perhaps this provision explains the Wisconsin Attorney General's description of the *Sloan* opinion: "[T]he court went *so far* as to state that no contract could carry a charge of more than ten per cent per annum simple interest." 54 OP. WIS. ATTY. GEN. 235, 245 (1965) (emphasis added).

But whatever the reason, all credit sales arrangements in Arkansas are now limited to 10% per annum without exception.[85]

An empirical study of the Arkansas experience subsequent to the *Sloan* case was funded by the American Bar Foundation and undertaken by the Board of Student Editors of the University of Illinois Law Forum. Its conclusions could have been anticipated. First, the standards for availability of credit in Arkansas were remarkably more stringent than those in Illinois, with many an Arkansas borrower who would be considered "an average if not a good" credit risk in Illinois being denied credit at home.[86] As a result, some otherwise reputable lenders were willing to risk engaging in usurious loans to those "good" credit risks excluded from the market by the stricter Arkansas standards, and community opinion began to question the wisdom of the Arkansas usury statute.[87] Furthermore, it was well-documented that the Arkansas usury law ceiling was not preventing imaginative lenders from realizing more than the amount loaned by virtue of disreputable peripheral practices.[88] The study also substantiated the major assumption that retailers would recoup credit costs that could not be offset by the permissible finance charges with higher cash prices,[89] with the effect that everyone, including those who bought for cash, paid the credit costs otherwise payable only by credit buyers. This, of course, was an avenue of self-help to retailers unavailable to banks and other lenders; the effect of

85. In Strickler v. State Auto Fin. Co., 220 Ark. 565, 571, 249 S.W.2d 307, 312 (1952), the court invalidated the Arkansas Installment Loan Act, Act 203 of 1951, [1951] Ark. Acts 472-75 (repealed 1953), a typical small loan law, because in Arkansas "the Legislature was powerless to validate the charge."

86. *An Empirical Study of the Arkansas Usury Law: "With Friends Like That . . ."*, 1968 U. ILL. L.F. 544, 587 [hereinafter *Empirical Study*].

87. *Id.*

88. *Id.* at 588. Among the practices resorted to were excessive credit insurance charges, failure to return prepaid but unearned charges, and illegal flat service charges on small loans. "[L]ack of knowledge on the part of the borrower permits the lender to use these illegal devices and escape detection. The self-enforcing usury statute does not prevent the exploitation of the unsophisticated." *Id.* It may seem anomalous that the loan shark, the supposed target of the usury statutes, is the only one who can operate effectively when they are enforced.

89. *Id.* at 588. Cash prices were 4% to 7% higher in Arkansas than in other states. As a part of the same empirical study, a University of Arkansas Professor of Finance, Gene C. Lynch, while corroborating many of the study's findings, provided a further analysis of the effect of low usury ceilings like those of Arkansas on a vendor's cash prices. In a sampling of several large retailing chains, including the J.C. Penney Co., it was found that the average cash prices charged in populous areas in Illinois were as much as 8½% lower than in neighboring areas in Arkansas. Lynch, *supra* note 7, at 599 (Table 9). While conceding that it would be foolish to assume that retailers raised their prices in a deliberate attempt to cover credit costs, Lynch concluded that the only factor that could logically account for the higher cash prices in Arkansas was the strict 10% usury ceiling. The cause of higher prices, he found, was not higher absolute costs, but rather lower revenues from credit sales. *Id.* at 605. The amount of the cash price differential was thus seen as a subsidy paid to credit buyers by middle- and upper-income groups and older people, the traditional cash buyers. *Id.* at 619.

applying the usury ceiling was thus discriminatory as well. The authors concluded that although their study was "not designed to arrive at an optimum usury rate, it clearly demonstrates that the present Arkansas ten per cent usury rate is truly a malignant benefactor."[90]

The decisions of only one other jurisdiction seem to comport with that of the *Penney* case. In a Nebraska case, *Lloyd v. Gutgsell*,[91] involving an installment sales contract, it was held under the bona fide time-price test that "[w]here a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest."[92] The implications of this holding for the fate of revolving charge account plans in Nebraska were clear. Subsequent events in Nebraska, if at all indicative of what Wisconsin can now expect, may make the *Penney* result even more frustrating. The Nebraska legislature responded to the *Lloyd* holding by amending its constitution,[93] and by specifically giving its blessing to revolving and installment credit.[94] Thus was the law returned to the *status quo ante*. The only possible virtue of the process, if repeated in Wisconsin, would be the chance that the legislature, once jostled into action, would include in its efforts some more enlightened treatment of creditor abuses.

The courts of one other state have specifically considered the applicability of usury statutes to the revolving charge account. The Supreme Court of Tennessee, in *Dennis v. Sears, Roebuck & Company*,[95] opting for a result opposite to that of *Penney*, chose merely to cite the overwhelming authority in favor of the time-price exemption. The court held that the argument made for defining "interest"[96] to include time-price differentials "must be rejected" because "[i]t is based solely on grounds that address themselves to the legislature. Moreover it is not at all certain that the policy urged on us is the best policy."[97] It would seem that the *Dennis* court elected an alternative method of stimulating legislative action, one which accomplishes the same ultimate result as the Nebraska gymnastics but without the embarrassing usurpation of the legislative initiative.

90. *Empirical Study*, *supra* note 86, at 588.

91. 175 Neb. 775, 124 N.W.2d 198 (1963). *See also* McNish v. Gen. Credit Corp., 164 Neb. 526, 83 N.W.2d 1 (1957).

92. 175 Neb. at 782, 124 N.W.2d at 204.

93. Ch. 3, [1963] Neb. Laws Spec. Sess., *amending* NEB. CONST. art. III, § 18.

94. NEB. REV. STAT. §§ 45-204 to -208 (1968).

95. 446 S.W.2d 260 (Tenn. 1969).

96. The appellant had conceded that when the usury provision for the state was adopted, it had been the long-settled common-law rule that the term "interest" did not apply to the price differential charged on a credit sale, and that at common law usury could not occur absent a loan of money or forbearance of a debt. 446 S.W.2d at 265. To redefine "interest," the court felt, would be unabashed judicial law-making. 446 S.W.2d at 265-66.

97. 446 S.W.2d at 265.

By eschewing a revolutionary decision in a case like *Dennis*, courts are not necessarily pigeonholing the problem and perpetuating an unsatisfactory environment for consumer credit. Revolutionary decisions like that in *Penney* would be more defensible, or at least understandable, if extensive efforts were not being made to solve the problems legislatively. In fact, perhaps the worst possible side effect of the *Penney* holding could be the creation of an impression in the state legislature that the court's redefinition of usury concepts has served the purpose of vindicating the consumer's rights and that no legislative refinements are necessary.

IV. The Appropriate Alternative

In accord with the view that consumer credit problems are notably ill-suited to judicial resolution under the usury laws, some states have already enacted legislation to deal with revolving charge plans,[98] as they have with installment sales plans; none of these enactments require a finance charge to be below 1½% per month. A similar bill met with a governor's veto in Wisconsin,[99] but perhaps that is for the best, since continual legislative patching and mending will not suffice to eliminate the anomalies and inconsistencies characterizing consumer credit regulation. A more fundamental restructuring of the applicable statutory framework has been undertaken under the aegis of the National Conference of Commissioners on Uniform State Laws. The product of that effort, the Uniform Consumer Credit Code (UCCC),[100] rests on the premise that given true competition in the credit industry and given consumers provided with information sufficient to enable "shopping" among various credit sources, the question of usury would be moot. Theoretically, excessive interest charges would be almost impossible. Provisions of the recent federal truth-in-lending legislation, which is part of the Consumer Credit Protection Act,[101] and the UCCC suggest that the questions raised by a case like *Penney* have already been extensively analyzed, with results that make the court's decision seem almost embarrassingly outdated. First, the kind of disclosure sought under both enactments—requiring creditors to compute and divulge the "true" annual percentage interest rate—provides the consumer with a common denominator by which he can compare credit offers.[102]

98. Currently, twenty-five states and Puerto Rico have enacted legislation regarding revolving charge plans. *See* 1 CCH Consumer Credit Guide ¶ 520, at 1401-31 (1971).

99. Wisconsin Bill No. 256 S. *See* Veto Message of Governor Gaylord Nelson, October 28, 1959.

100. Uniform Consumer Credit Code (rev. final draft 1969) [hereinafter UCCC].

101. Consumer Credit Protection Act, May 29, 1968, Pub. L. No. 90-321, 82 Stat. 146, 15 U.S.C. §§ 1601-77 (Supp. V, 1965-1969) [hereinafter CCPA].

102. UCCC §§ 2.301-.313, 3.301-.312. These provisions essentially incorporate the federal truth-in-lending requirements. CCPA §§ 121-29, 15 U.S.C. §§ 1631-39 (Supp. V, 1965-1969).

The *Penney* two-price disclosure requirement seems simplistic by comparison, especially since it ignores the possibility that many consumers are unable to compare the time factors involved in prospective interest arrangements.

Moreover, the framers of these enactments have made it clear that the intent of the disclosure provisions is to foster competition among credit sellers and thereby "generally force rates below the permitted maximum charges."[103] Competition, it was hoped, would make usury law interest ceilings unnecessary to control profits of creditors.[104] Although a case has been made for the complete elimination of ceilings,[105] the Commissioners thought it preferable merely to attempt to ensure that competitive factors would keep prices below the ceilings established.[106] Maintaining some maximum levels for interest rates was advocated as a means of preventing the extremely necessitous borrower from assuming debt at unconscionable rates. It is nonetheless significant that the ceiling established for department store revolving credit charges is 2% per month on the first $500 and 1½% per month on the excess.[107] This is an apparent departure from the Commissioners' stated goal of according equal treatment to all types of creditors, in both sale and loan credit,[108] since the Code applies only the lower 1½% ceiling to revolving charge accounts serviced by *lenders*.[109] This exception was made in specific recognition of the fact that some smaller stores "are losing money at [a finance charge rate of] 18%, and it seems desirable to encourage them to use revolving credit at 24% rather than higher rates for installment sales."[110]

Most relevant, however, is the commentary from the Commissioners on the status of the time-price doctrine in the modern credit environment. The Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury found itself trying to ex-

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103. UCCC § 3.503, Comment 1. As a corollary to the achievement of this goal, the UCCC eliminates—except in special cases—the common restrictive practice of licensing lenders. *See* UCCC §§ 3.501-.503.

104. "[A] rate ceiling is a very imperfect instrument for controlling profits." Braucher, *Consumer Credit Reform: Rates, Profits and Competition*, 43 TEMP. L.Q. 313, 327 (1970). Professor Braucher was vice president of the National Conference of Commissioners on Uniform State Laws and a member of the special committee responsible for the UCCC.

105. Kawaya, *The Case Against Regulating Consumer Credit Charges*, 5 AM. BUS. L.J. 319 (1967).

106. *See* Johnson, *Regulation of Finance Charges on Consumer Instalment Credit*, 66 MICH. L. REV. 81 (1967), in which it is demonstrated that competition in several areas of consumer credit has in fact forced rates well below statutory ceilings.

107. UCCC § 2.207(3).

108. Braucher, *supra* note 104, at 318.

109. UCCC § 2.301(4).

110. Braucher, *supra* note 104, at 325.

plain why it had devoted separate sections with substantially similar provisions to credit sales and cash loans:

> [T]he Committee was and is aware that, sociologically and economically, sales credit and loan credit are alike and that their separate treatment results in much duplication in drafting. Nevertheless, we are mindful of the weight given to Uniform Acts by Courts of States which have not enacted them. Thus, long before the Uniform Commercial Code was enacted or even introduced in New York, the New York Court of Appeals relied in part on a provision of the Uniform Commercial Code in overruling the Court's prior decisions on privity of contract and determining who may recover upon a breach of warranty in a sale of goods. *The Committee believes that any encouragement to the courts of a State which has not enacted the Uniform Consumer Credit Code to rely on the Code's provisions to reject the time sale price doctrine would have most unfortunate social and economic consequences for both consumers and credit grantors.*[111]

The Committee, which spent several years investigating the problems of consumer credit,[112] was willing to duplicate effort, sacrifice one of its stated goals, and suffer some pointed criticism[113] simply to avoid giving even remote encouragement to the kind of decision made in *Penney*.

It seems strange that the Attorney General of Wisconsin would initiate an action, such as that of the *Penney* case, which would compel a decision between such undesirable judicial alternatives.[114]

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111. UCCC Prefatory Note, at 8 (emphasis added).

112. Late in the 1950's, a request was received from the Council of State Governments to prepare a Uniform Retail Installment Sales Act, but the project was tabled pending completion of the CURRAN study, *supra* note 21. In 1963 the Commissioners appointed the Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury. Braucher, *supra* note 104, at 314.

113. For an example of criticism from virtually within its own camp, see Curran & Fand, *An Analysis of the Uniform Consumer Credit Code*, 49 NEB. L. REV. 727, 744 (1970).

114. Since "[o]nly a few legislatures have realized the . . . importance of clarifying the vague legal status of revolving credit" (*Revolving Credit, supra note* 9, at 333), it was perhaps the aim of the Attorney General to force a showdown with the legislature in the hope of expediting enlightened legislative treatment. *Compare* the Nebraska experience discussed in text accompanying notes 93 & 94 *supra*. An intermittent dialogue among the Wisconsin principals can be pieced together from published materials that shed considerable light on the forces involved in pressing this action. *See* Boyle, *supra* note 7, at 33. Boyle, the supervisor of the Division of Consumer Credit of the state's banking department—and more importantly, the state's first small loan supervisor—complained that the Division would have to seek a formal opinion of the Attorney General with regard to the legality of the revolving credit plans of the large department stores. He explained, *inter alia*, that the "purpose in bringing this to your [the small loan industry's] attention is not because these companies are in competition with you, which, however, is true, but more so because of the fact that there is no regulation of their operations . . . ." *Id.* at 67. This statement casts some doubt on the assumption that the motives behind the action in *Penney* were exclusively consumer-protective. The supervisor's concern seemed to be the likelihood that small loan businesses could not compete with revolving credit vendors, who

Once a court is confronted with the necessity of deciding a question like that presented by *Penney*, however, the prevalence of strong authority for the economically preferable result should afford some deterrence against adopting a minority view with far-reaching repercussions. The time-price doctrine, though a fiction, can now be understood to be an amiable one. When viewed in the light of a century of judicial and legislative inaction, it could almost be said to have been ratified, not because its logical basis is or ever was legitimate, but because its effects are those which the legislature prefers, or at least has no desire to alter. Notwithstanding its awareness of the logical inconsistencies of the all-but-unanimously accepted time-price doctrine, a court sensitive to the proper limitations of its role in matters of economic regulation should pause to consider the practical effects of its rejection of such a doctrine, especially when viable legislative alternatives are available.

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had no comparable licensing requirements. *See also* Hagen, *Credit Sales Under Wisconsin Usury Law*, MBA GAVEL, Dec. 1970, at 23; *id., Wisconsin Usury Law and the Revolving Charge Account*, MBA GAVEL, Dec. 1969, at 1.